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ASSOCIATION OF CENTRAL CALIFORNIA,
6 GROWER-SHIPPER ASSOCIATION OF SAN LUIS
OBISPO AND SANTA BARBARA COUNTIES, and
7 WESTERN GROWERS

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10 BEFORE THE
11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
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13 In the Matter of the Petition of Grower-Shipper
Association of Central California, Grower-
14 Shipper Association of San Luis Obispo and
Santa Barbara Counties, and Western Growers
15 for Review of Action and Failure to Act by
Central Coast Regional Water Quality Control
16 Board.

SWRCB/OCC File No. _____

GROWER-SHIPPER ASSOCIATION OF
CENTRAL CALIFORNIA, GROWER-
SHIPPER ASSOCIATION OF SAN LUIS
OBISPO AND SANTA BARBARA
COUNTIES, and WESTERN GROWERS'
REQUEST FOR STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
[Wat. Code, § 13320]

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21 Pursuant to Water Code sections 13320 and 13321, and title 23, section 2053 of the
22 California Code of Regulations, the Grower-Shipper Association of Central California, Grower-
23 Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western Growers
24 (Petitioners) hereby request a stay of certain provisions of Order No. R3-2012-0011 *Conditional*
25 *Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands* (Conditional
26 Waiver), Order No. R3-2012-0011-01 *Monitoring and Reporting Program for Tier 1 Dischargers*
27 *Enrolled Under the Conditional Waiver of Waste Discharge Requirements For Discharges from*
28 *Irrigated Lands* (Tier 1 MRP), Order No. R3-2012-0011-02 *Monitoring and Reporting Program*

1 *for Tier 2 Dischargers Enrolled Under the Conditional Waiver of Waste Discharge Requirements*
2 *for Discharges from Irrigated Lands* (Tier 2 MRP), and Order No. R3-2012-0011-03 *Monitoring*
3 *and Reporting Program for Tier 3 Dischargers Enrolled Under the Conditional Waiver of Waste*
4 *Discharge Requirements for Discharges from Irrigated Lands* (Tier 3 MRP) (collectively, MRP
5 Orders), which were adopted by the Regional Water Quality Control Board, Central Coast Region
6 (Central Coast Water Board) on March 15, 2012. The Conditional Waiver and MRP Orders are
7 attached as Exhibits A through D, respectively, to Grower-Shipper Association of Central
8 California, Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and
9 Western Growers' Petition For Review and Statement of Points and Authorities in Support
10 Thereof (Petition), filed concurrently herewith. In the Petition, Petitioners challenge the Central
11 Coast Water Board's adoption of the Conditional Waiver and MRP Orders, the Central Coast
12 Water Board's failure to properly consider the alternative proposed by agricultural interests,
13 including the Petitioners, and certain provisions of the Conditional Waiver and MRP Orders.

14 Petitioners seek this stay on behalf of their members who are subject to certain provisions
15 in the Conditional Waiver and MRP Orders, which are specifically identified in section B below.
16 Petitioners' members include, among others, owners and operators of irrigated lands in the
17 Central Coast Region of California, who are considered to be agricultural dischargers under the
18 terms of the Conditional Waiver. (Conditional Waiver, Attachment A, p. 86; see Wat. Code,
19 § 13200(c) [definition of Central Coast Region.]) Many of Petitioners' members will be
20 subjected to the prescriptive Conditional Waiver provisions that apply to all farms/ranches in the
21 Central Coast Region and additional requirements will apply to farms/ranches categorized as
22 Tier 2 or Tier 3. Compliance with the provisions identified in this Stay Request while the State
23 Water Resources Control Board (State Water Board) considers the Petition will impose
24 substantial economic harm and immediate exposure to legal liability for agricultural dischargers
25 in the Central Coast.

1 On behalf of their members, Petitioners seek a stay of various provisions of the
2 Conditional Waiver and MRP Orders that are improper and unsupported. Petitioners request that
3 any such stay take effect as of the effective date of the Conditional Waiver and MRP Orders until
4 the State Water Board takes final action on the Petition.

5 Concurrent with this Stay Request, Petitioners submit several declarations.¹ The Stay
6 Request and supporting declarations demonstrate that a stay is appropriate in this case because:
7 (1) the stay will prevent substantial harm to Petitioners, their members, and the public interest;
8 (2) the stay will not cause substantial harm to other interested persons or the public interest; and
9 (3) the Petition raises substantial questions of fact or law. (See Cal. Code Regs., tit. 23,
10 § 2053(a)(1)-(3).) In general, to comply with the Conditional Waiver and MRP Orders,
11 Petitioners' members must hire consultants, evaluate nitrate loading risks, prepare surface water
12 sampling and analysis plans, set aside riparian buffer areas, install back flow prevention devices
13 to irrigation systems, and immediately comply with all applicable water quality standards. In
14 short, absent a stay, Petitioners' members must spend a significant amount of private resources on
15 complying with the Conditional Waiver and MRP Orders *before* the State Water Board can
16 resolve the Petition. In addition, absent a stay, Petitioners' members are exposed to legal liability
17 due to noncompliance with water quality standards. The Memorandum of Points and Authorities
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19 ¹ See Declaration of Peter C. Aiello in Support of Grower-Shipper Association of Central California, Grower-Shipper
20 Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For Stay (Aiello Decl.);
21 Declaration of Bob Campbell in Support of Grower-Shipper Association of Central California, Grower-Shipper
22 Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For Stay (Campbell
23 Decl.); Declaration of David Costa in Support of Grower-Shipper Association of Central California, Grower-Shipper
24 Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For Stay (Costa Decl.);
25 Declaration of Dirk Giannini in Support of Grower-Shipper Association of Central California, Grower-Shipper
26 Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For Stay (Giannini
27 Decl.); Declaration of Michael L. Johnson in Support of Grower-Shipper Association of Central California, Grower-
28 Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For Stay
(Johnson Decl.); Declaration of Robert Martin in Support of Grower-Shipper Association of Central California,
Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western Growers' Request For
Stay (Martin Decl.); Declaration of Gary L. McKinsey in Support of Grower-Shipper Association of Central
California, Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western Growers'
Request For Stay (McKinsey Decl.); Declaration of Claus Suverkropp in Support of Grower-Shipper Association of
Central California, Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western
Growers' Request For Stay (Suverkropp Decl.); and, Declaration of Lowell Zelinski in Support of Grower-Shipper
Association of Central California, Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and
Western Growers' Request For Stay (Zelinski Decl.).

1 following identifies the specific provisions of the Conditional Waiver and MRP Orders that the
2 Petitioners' seek to stay, and further demonstrates that such a stay is justified.

3 SOMACH SIMMONS & DUNN
4 A Professional Corporation

5 DATED: April 16, 2012

By: 

Theresa A. Dunham, Attorneys for Petitioners
Grower-Shipper Association of Central California,
Grower-Shipper Association of San Luis Obispo and
Santa Barbara Counties, and Western Growers

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9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 Pursuant to Water Code sections 13320 and 13321, Petitioners concurrently file their
11 Petition related to the Conditional Waiver and MRP Orders. This Stay Request satisfies the
12 requirements of title 23, section 2053 of the California Code of Regulations.

13 **A. STATEMENT OF FACTS**

14 The Central Coast Water Board's process for adoption of the Conditional Waiver spanned
15 over two years. It was also fairly convoluted. To begin, a stakeholder process was initiated by
16 Central Coast Water Board staff and others to discuss issues for renewal of the 2004 Conditional
17 Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (2004 Agricultural
18 Order). But the process broke down and ended in 2009. In response to the abandoned
19 stakeholder process, Central Coast Water Board staff prepared and then released a Preliminary
20 Draft Agricultural Order on February 1, 2010. After holding two public workshops and receiving
21 hundreds of comment letters, the Central Coast Water Board then released a draft order on
22 November 19, 2010, for public review and comment. The draft order issued on November 19,
23 2010, was subsequently revised, and new versions dated March 17, 2011, and September 1, 2011,
24 were released by Central Coast Water Board staff. The September 1, 2011 version, with some
25 minor proposed changes, was presented to the Central Coast Water Board on March 14, 2012, for
26 its consideration. Between September of 2011 and March 14, 2012, the Central Coast Water
27 Board was unable to take any final action on the Conditional Waiver because there was not a
28 quorum of members eligible to consider this item.

1 Concurrently, in response to the Central Coast Water Board's publicly distributed draft
2 orders, a coalition of agricultural organizations, including Petitioners, developed and submitted
3 various versions of a variable alternative for Central Coast Water Board consideration, each
4 version building upon the previous based on comments received. The first alternative was
5 submitted on December 3, 2010. Subsequently, Petitioners and other agricultural organizations
6 presented a more comprehensive alternative in redline format to the Central Coast Water Board at
7 a panel hearing held on March 17, 2011, and additional revisions at its subsequent panel hearing
8 on May 4, 2011. At the May 4, 2011 hearing, Central Coast Water Board staff were directed to
9 make changes in a manner consistent with that provided by Central Coast Water Board members
10 taking into consideration Board member comments given at the March 17 and May 4, 2011
11 hearings.

12 This Central Coast Water Board direction resulted in the preparation of a Staff
13 Addendum, and public notice and review with respect to the agricultural alternative. That public
14 comment period closed on August 1, 2011. Subsequently, the September 1, 2011 draft was
15 released for consideration at a hearing scheduled for September 1, 2011. However, due to a lack
16 of quorum, the September 1, 2011 hearing was canceled and nothing was publicly scheduled on
17 this item again until February 1, 2012, which was a workshop for the benefit of new Central
18 Coast Water Board members. The matter was then scheduled for Central Coast Water Board
19 consideration on March 14-15, 2012.

20 At the March 15, 2012 hearing, and after the matter was turned over to the Central Coast
21 Water Board, Board Member Johnston presented additional amendments for Central Coast Water
22 Board consideration. According to Board Member Johnston, he had prepared these amendments
23 in advance with assistance from the Central Coast Water Board's Executive Officer Roger Briggs
24 (Executive Officer Briggs) and legal counsel Ms. Frances McChesney (Counsel McChesney).
25 Ultimately, after some discussion, the Central Coast Water Board adopted the Conditional Waiver
26 and MRP Orders with Board Member Johnston's amendments and others. The origins of the
27 amendments, which are addressed in the Petition, raise significant issues with respect to improper
28 ex parte contacts and violations of due process. For purposes here, Petitioners seek immediate

1 relief for their members of the most harmful provisions that expose agricultural dischargers to
2 excessive economic harm as well as immediate liability while the Petition is considered by the
3 State Water Board. The questionable process for adoption, as well as many other substantive
4 issues raised by Petitioners, will be more fully considered as part of the Petition.

5 **B. PROVISIONS PETITIONERS SEEK TO STAY**

6 To avoid immediate harm to their members, Petitioners request a stay of the following
7 provisions:

8 1. Conditional Waiver Provision 22 of Part B, General Conditions and Provisions for
9 All Dischargers – Tier 1, Tier 2, and Tier 3, which requires all dischargers to immediately
10 “comply with applicable water quality standards, as defined in Attachment A, protect the
11 beneficial uses of waters of the State and prevent nuisance as defined in Water Code
12 section 13050.” (Conditional Waiver, p. 18);

13 2. Conditional Waiver Provision 23 of Part B, General Conditions and Provisions for
14 All Dischargers – Tier 1, Tier 2 and Tier 3, which requires all dischargers to immediately
15 “comply with applicable provisions of the Central Coast Region Water Quality Control Plan
16 (Basin Plan) and all other applicable water quality control plans as identified in Attachment A.”
17 (Conditional Waiver, p. 18);

18 3. Conditional Waiver Provision 31 of Part B, General Conditions and Provisions for
19 All Dischargers – Tier 1, Tier 2 and Tier 3, which requires all dischargers to install and/or
20 maintain back flow prevention devices for any irrigation system that is used to apply fertilizers,
21 pesticides, fumigants, or other chemicals by October 1, 2012 (Conditional Waiver, pp. 19-20);

22 4. Conditional Waiver Provision 39 of Part B, General Conditions and Provisions for
23 All Dischargers – Tier 1, Tier 2 and Tier 3, which requires all dischargers to immediately
24 “a) maintain existing, naturally occurring, riparian vegetative cover (such as trees, shrubs, and
25 grasses) in aquatic habitat areas as necessary to minimize the discharge of waste; and b) maintain
26 riparian areas for effective streambank stabilization and erosion control, stream shading and
27 temperature control, sediment and chemical filtration, aquatic life support, and wildlife support to
28 minimize the discharge of waste;” (Conditional Waiver, p. 20);

1 5. Subsection g of Conditional Waiver Provision 44 of Part B, General Conditions
2 and Provisions for All Dischargers – Tier 1, Tier 2, and Tier 3, which requires all dischargers to
3 describe and include results of methods used to verify practice effectiveness and compliance with
4 this Order by October 1, 2012 (Conditional Waiver, p. 22);

5 6. Conditional Waiver Provision 67 of Part E, Additional Conditions that Apply to
6 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
7 Tier 2 and/or Tier 3 to file by October 1, 2012 (and annually thereafter), an Annual Compliance
8 Form that includes all of the information requested, which is identified in the Tier 2 MRP and
9 Tier 3 MRP (Conditional Waiver, p. 27);

10 7. Conditional Waiver Provision 68 of Part E, Additional Conditions that Apply to
11 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
12 Tier 2 and/or Tier 3 to file by October 1, 2012, their determination of nitrate loading risk factor(s)
13 in accordance with requirements specified in the Tier 2 MRP and Tier 3 MRP, and to report by
14 October 1, 2012, the nitrate loading risk factors and overall Nitrate Loading Risk level calculated
15 for each ranch/farm or nitrate loading risk unit in the Annual Compliance Form (Conditional
16 Waiver, p. 28);

17 8. Conditional Waiver Provision 69 of Part E, Additional Conditions that Apply to
18 Tier 2 and Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as
19 Tier 2 and/or Tier 3, and that have farms/ranches that are adjacent to or contain a waterbody
20 identified on the 2010 List of Impaired Waterbodies as impaired for temperature, turbidity, or
21 sediment to, by October 1, 2012, conduct and report photo monitoring of the condition of
22 perennial, intermittent, or ephemeral streams and riparian and wetland area habitat, and
23 demonstrate compliance with erosion and sedimentation requirements identified in Provision 80
24 of Part F, Additional Conditions that apply to Tier 3 Dischargers (Conditional Waiver, p. 28);

25 9. Conditional Waiver Provision 72 of Part F, Additional Conditions that Apply to
26 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 to
27 initiate individual surface water discharge monitoring in accordance with the requirements
28

1 specified in the Tier 3 MRP by October 1, 2012, or initiate an alternative that is approved by the
2 Central Coast Water Board's Executive Officer (Conditional Waiver, p. 29);

3 10. Conditional Waiver Provision 73 of Part F, Additional Conditions that Apply to
4 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 to
5 submit by March 15, 2014, individual surface water discharge monitoring data and reports as
6 required by the Tier 3 MRP, or submit alternative monitoring reporting program data approved by
7 the Central Coast Water Board's Executive Officer (Conditional Waiver, p. 29);

8 11. Conditional Waiver Provision 74 of Part F, Additional Conditions that Apply to
9 Tier 3 Dischargers, which requires dischargers meeting the criteria or designation as Tier 3 and
10 that have High Nitrate Loading Risk farms/ranches to, by October 1, 2013, determine typical crop
11 nitrogen uptake for each crop type produced and report the basis for the determination as required
12 by the Tier 3 MRP (Conditional Waiver, p. 29);

13 12. Subdivision a of Conditional Waiver Provision 80 of Part F, Additional Conditions
14 that Apply to Tier 3 Dischargers, as applied to dischargers meeting the criteria or designation as
15 Tier 2 and/or Tier 3 and that have farms/ranches adjacent to or containing a waterbody identified
16 on the 2010 List of Impaired Waterbodies as impaired for temperature, turbidity, or sediment
17 through the incorporation of this provision into Conditional Waiver Provision 69, which requires
18 dischargers to show compliance with maintaining a filter strip of appropriate width, and
19 consisting of undisturbed soil and riparian vegetation or its equivalent between significant land
20 disturbance activities and watercourses, lakes, bays, estuaries, marshes, and other waterbodies
21 (Conditional Waiver, p. 31);

22 13. Section A, paragraphs 1 through 5, and Section B of Tier 1 MRP Part 2,
23 Groundwater Monitoring and Reporting Requirements, which requires dischargers to sample
24 private domestic drinking water and agricultural groundwater wells by March 15, 2013, and to
25 report the results to the Central Coast Water Board by October 1, 2013 (Tier 1 MRP, pp. 8-10);

26 14. Section A, paragraphs 1 through 5, and Section B of Tier 2 MRP Part 2,
27 Groundwater Monitoring and Reporting Requirements, which requires dischargers to sample
28

1 private domestic drinking water and agricultural groundwater wells by March 15, 2013, and to
2 report the results to the Central Coast Water Board by October 1, 2013 (Tier 2 MRP, pp. 8-10);

3 15. Section C of Tier 2 MRP Part 2, Groundwater Monitoring and Reporting
4 Requirements, which requires dischargers meeting the criteria or designation as Tier 2 to
5 calculate the nitrate loading risk factor for each ranch/farm included in their operations, and
6 requires such Tier 2 dischargers with individual farms/ranches that have a HIGH nitrate loading
7 risk to report total nitrogen applied per crop, per acre, per year on the Annual Compliance Form
8 by October 1, 2012, and annually thereafter (Tier 2 MRP, pp. 11-12);

9 16. Tier 2 MRP Part 3, Annual Compliance Form, which requires dischargers meeting
10 the criteria or designation as Tier 2 to submit by October 1, 2012, and annually thereafter, an
11 Annual Compliance Form that includes, but is not limited to: identification of the application of
12 any fertilizers, pesticides, fumigants, or other chemicals through an irrigation system, proof of
13 proper backflow prevention devices, description of method and location of chemical applications
14 relative to surface water, Nitrate Loading Risk Factors; and, for dischargers meeting the criteria
15 or designation as Tier 2 and that have farms/ranches that contain or are adjacent to a waterbody
16 impaired for temperature, turbidity, or sediment photo monitoring to document conditions of
17 streams, riparian, and wetland area habitat (Tier 2 MRP, pp. 12-13);

18 17. Tier 2 MRP Part 4, Photo Monitoring and Reporting Requirements, which requires
19 dischargers meeting the criteria or designation as Tier 2 to conduct and submit by October 1,
20 2012, photo monitoring consistent with yet-to-be established protocols, and explain and
21 demonstrate compliance with erosion and sedimentation requirements (Tier 2 MRP, p. 14);

22 18. Section A, paragraphs 1 through 5, and Section B of Tier 3 MRP Part 2,
23 Groundwater Monitoring and Reporting Requirements, which requires dischargers to sample
24 private domestic drinking water and agricultural groundwater wells by March 15, 2013, and to
25 report the results to the Central Coast Water Board by October 1, 2013 (Tier 3 MRP, pp. 8-10);

26 19. Section C of Tier 3 MRP Part 2, Groundwater Monitoring and Reporting
27 Requirements, which requires dischargers meeting the criteria or designation as Tier 3 to
28 calculate the nitrate loading risk factor for each ranch/farm included in their operations, and

1 requires such Tier 3 dischargers with individual farms/ranches that have a HIGH nitrate loading
2 risk to report total nitrogen applied per crop, per acre, per year on the Annual Compliance Form
3 by October 1, 2012, and annually thereafter (Tier 3 MRP, pp. 10-12);

4 20. Tier 3 MRP Part 3, Annual Compliance Form, which requires dischargers meeting
5 the criteria or designation as Tier 3 to submit by October 1, 2012, and annually thereafter, an
6 Annual Compliance Form that includes, but is not limited to: identification of the application of
7 any fertilizers, pesticides, fumigants, or other chemicals through an irrigation system, proof of
8 proper backflow prevention devices, description of method and location of chemical applications
9 relative to surface water, Nitrate Loading Risk Factors; and, for dischargers meeting the criteria
10 or designation as Tier 2 and that have farms/ranches that contain or are adjacent to a waterbody
11 impaired for temperature, turbidity, or sediment photo monitoring to document conditions of
12 streams, riparian, and wetland area habitat (Tier 3 MRP, pp. 12-14);

13 21. Tier 3 MRP Part 4, Photo Monitoring and Reporting Requirements, which requires
14 dischargers meeting the criteria or designation as Tier 3 to conduct and submit by October 1,
15 2012, photo monitoring consistent with yet to be established protocols, and explain and
16 demonstrate compliance with erosion and sedimentation requirements (Tier 3 MRP, p. 14); and,

17 22. Tier 3 MRP Part 5, Individual Surface Water Discharge Monitoring and Reporting
18 Requirements, which requires dischargers meeting the criteria or designation as Tier 3 to submit
19 an individual surface water discharge Sampling and Analysis Plan and Quality Assurance Project
20 Plan (QAPP) by March 15, 2013, to monitor individual discharges of waste from their
21 farm/ranch, including irrigation run-off (including tailwater discharges and discharges from tile
22 drains, tailwater ponds, and other surface water containment features); and, which requires
23 dischargers meeting the criteria or designation as Tier 3 to initiate individual surface water
24 discharge monitoring per the Sampling and Analysis Plan and QAPP by October 1, 2013 (Tier 3
25 MRP, pp. 14-16.)

26 **C. STANDARD FOR ISSUANCE OF A STAY**

27 Water Code section 13321(a) provides: "In the case of a review by the state board under
28 Section 13320, the state board, upon notice and hearing, if a hearing is requested, may stay in

1 whole or in part the effect of the decision and order of a regional board or of the state board.”
2 The State Water Board’s regulations further provide that it may grant a stay if the petitioner
3 demonstrates:

- 4 (1) [S]ubstantial harm to petitioner or to the public interest if a stay is not
5 granted;
- 6 (2) [A] lack of substantial harm to other interested persons and to the public
7 interest if a stay is granted, and
- 8 (3) [S]ubstantial questions of fact or law regarding the disputed action.
(Cal. Code Regs., tit. 23, § 2053(a).)

9 The request for stay must be supported by a declaration under penalty of perjury of a
10 person or persons with knowledge of the facts alleged. (Cal. Code Regs., tit. 23, § 2053(a).) As
11 demonstrated below, Petitioners’ request satisfies these requirements.

12 **D. THE STATE WATER BOARD SHOULD ISSUE A STAY PENDING
13 RESOLUTION OF PETITIONERS’ PETITION FOR REVIEW**

14 Petitioners timely submit this request for a stay of certain provisions that were adopted by
15 the Central Coast Water Board on March 15, 2012. (See *In the Matter of the Petitions of Boeing
16 Company* (June 21, 2006), Order WQ 2006-0007 (Boeing Order), p. 5.) Petitioners’ members will
17 suffer substantial harm if the State Water Board does not grant the Stay Request; no substantial
18 harm to other interested persons or the public interest would result if the State Water Board grants
19 the Stay Request; and there are substantial questions of fact or law regarding the challenged
20 action.

21 **1. Petitioners’ Members Will Suffer Substantial Harm If the State Water Board
22 Does Not Grant Petitioners’ Stay Request**

23 Petitioners’ members will suffer substantial harm if the State Water Board does not grant
24 Petitioners’ Stay Request for the period of time pending resolution of the Petition. (See Boeing
25 Order, p. 4 [“whether a stay is appropriate must be judged in the temporal sense”].) For
26 Petitioners’ members, excessive costs and immediate exposure to liability will occur while the
27 State Water Board considers the underlying Petition.

28 As shown in the six declarations from representative impacted growers in the Central
Coast Region, costs for implementing the Conditional Waiver and MRP Orders in their entirety

1 are substantial. (See, e.g., Martin Decl., ¶¶ 5, 6; see also Costa Decl., ¶¶ 6, 7.) More
2 importantly, with respect to this Stay Request, costs for implementing certain Tier 2 and Tier 3
3 requirements between now and December of 2013 are excessive. (See, e.g., Martin Decl., ¶ 7;
4 see also Costa Decl., ¶ 8; see also Campbell Decl., ¶ 8.) For example, one of the representative
5 agricultural operations estimates that for its operation of 3,866 acres, the estimated cost between
6 now and December 2013 will range between \$519,082 and \$853,924. (Martin Decl., ¶¶ 1, 7.)
7 For another grower, the cost will range between \$557,951 and \$747,803. (Costa Decl., ¶ 8.)
8 These costs, of course, presume that the State Water Board will have resolved the Petition by
9 the end of 2013. Should the State Water Board not resolve the Petition by then, the costs would
10 continue to increase significantly. On a per acre basis, the growers' estimates for complying
11 with Tier 2 and Tier 3 provisions between now and December 2013 range from \$46 per acre
12 (Costa Decl., ¶ 7) up to \$310 per acre (Aiello Decl., ¶ 5). The range represents the varying
13 degrees of complexity for each individual operation, as well as any economies of scale. In any
14 case, costs to comply in the short-term for agricultural operations while the matter is under
15 review are considerable and excessive.

16 As a specific example of one provision's associated costs, cost estimates were obtained
17 from *independent* qualified consultants. The cost to prepare an individual Sampling and
18 Analysis Plan (SAP) and QAPP for Tier 3 farms/ranches as is required by the Conditional
19 Waiver and Tier 3 MRP, is estimated to be between \$17,000 and \$28,800. (Suverkropp Decl.,
20 ¶ 7; Johnson Decl., ¶ 6.) Further, if a grower were required to conduct just one sampling event
21 between now and when the State Water Board resolves this matter, the cost could be upwards of
22 \$7,000 to \$11,000 per sampling event if there are five to ten sampling locations, respectively.
23 (Suverkropp Decl., ¶ 8.) These costs are significant to agricultural producers in the Central
24 Coast Region.

25 Furthermore, growers are unable to pass on these regulatory costs. As explained by
26 Professor J. Bradley Barbeau from California State University, Monterey Bay School of
27 Business, individual growers are "price takers" and have limited ability to pass higher costs
28 upward through price increases. (J. Bradley Barbeau and Kay L. Mercer, *Economic and Cost*

1 *Analysis of the Proposed Ag Waiver and Ag Alternative* (Aug. 1, 2011) (Barbeau Report),
2 attachment to Farmers for Water Quality Comments submitted on August 1, 2011, to the Central
3 Coast Water Board, attached hereto as Exh. B, p. 5.) More specifically, Barbeau states as
4 follows:

5 There is no evidence that individual growers have the market power to be able to
6 control price in this way, nor that there are effective means of collusion to
7 accomplish monopoly pricing by the growers. Individual growers are price takers;
8 their prices are determined by market conditions at the time of sale. While at a
9 market level the prices may adjust somewhat to reflect the increased costs,
10 individual growers do not have the power to push through those increases
11 themselves. Only a reduction in the quantity of each commodity produced,
12 without a corresponding reduction in demand for the commodity, can drive the
13 field price of the commodity upward. *Prices respond to the quantity of a good*
14 *that is supplied, not to the cost of producing that supply.* Individual growers who
15 face higher costs of implementing the Waiver relative to other growers will not be
16 able to recoup these costs by raising their prices; they will of necessity be faced
17 with lower margins. (Barbeau Report, p. 5, emphasis in original.)

18 Accordingly, agricultural producers will face excessive economic harm if the stay of
19 certain provisions is not granted by the State Water Board. Excessive compliance costs may
20 justify a stay. (See *In the Matter of the Petition of International Business Machines* (Dec. 15,
21 1988), Order No. WQ 88-15 (*In the Matter of IBM*), pp. 5-6 [State Water Board agreed that
22 IBM could be substantially prejudiced by preparing technical reports and plans while the matter
23 was under review by the State Water Board]; *City of Manteca v. State Water Resources Control*
24 *Bd.* (Sacramento County Superior Court, Oct. 8, 2010, Case No. 34-2010-80000492-CU-WM-
25 GDS) (Manteca Decision), attached hereto as Exh. A [court found that State Water Board's
26 denial for a stay was improper because Manteca had established that compliance costs were
27 disproportionate to the benefit to be gained].) The specific provisions in question that cause the
28 greatest economic harm between now and December 2013 are the following provisions of the
29 Conditional Waiver that are identified in section B above in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11,
30 12, 13, 14, 15, 16, 17, 18, 19, 20, and 22. Should the State Water Board not resolve this matter
31 timely, there are additional provisions not identified in this Stay Request that may cause
32 additional excessive economic harm, which would also need to be stayed at a later date.

33 Further, the costs of compliance for Petitioners' members are disproportionate to the
34 benefit to be gained. (See *In the Matter of the Petition of County of Sacramento Sanitation*

1 *District No. 1* (Aug. 22, 2003), Order WQO 2003-0010, p. 4; see also *In the Matter of the Petition*
2 *of Pacific Lumber Company* (May 17, 2001), Order WQ 2001-09, p. 3; see also Manteca
3 Decision.) The cost estimates identified in the accompanying Declarations of Aiello, Campbell,
4 Costa, Giannini, Martin, and McKinsey, primarily represent consulting and reporting costs – not
5 costs for implementing or installing new management practices. Further, as discussed in
6 section 3 below, the provisions in the Conditional Waiver and MRP Orders are unlikely to result
7 in improved water quality, or provide the Central Coast Water Board with any meaningful
8 information. For example, consider the individual surface water monitoring requirements. It will
9 cost an estimated \$17,000 to \$28,800 to prepare a proper SAP and QAPP. (Suverkropp Decl.,
10 ¶ 7; Johnson Decl., ¶ 6.) Each sampling event is then likely to cost an additional \$7,000 to
11 \$11,000. (Suverkropp Decl., ¶ 8.) However, the information obtained is unlikely to provide the
12 Central Coast Water Board with any real information with respect to water quality. (Transcript,
13 March 14, 2012 Hearing of the Waiver of Waste Discharge Requirements Discharged from
14 Irrigated Lands, Central Coast Regional water Quality Control Board, Panel Hearing (March 14,
15 2012 Transcript), p. 214:9-18 [“DR. LOS HUERTOS: The assumption is that we can use on-farm
16 monitoring to characterize water quality, and then use that to prioritize which farms to visit and
17 then, maybe, make some enforcements of the problem areas. The problem is that the on-farm
18 monitoring, four samples per year, cannot adequately describe water quality on the farm. It
19 doesn’t describe water quality. It doesn’t describe practice effectiveness and it doesn’t describe
20 any kind of trend analysis.”].)

21 Similarly, the Conditional Waiver, Tier 2 MRP, and Tier 3 MRP require growers to
22 determine nitrate loading risk factors for each farm/ranch using one of two methodologies
23 identified. (Conditional Waiver, p. 28; Tier 2 MRP, pp. 11-13; Tier 3 MRP, pp. 11-13.)
24 However, both methodologies are highly simplistic and unlikely to accurately determine nitrate
25 loading risks from each farm/ranch. (See Zelinski Decl., ¶¶ 7, 8, 9.) Thus, agricultural
26 dischargers subject to the Conditional Waiver will be required to spend significant resources to
27 comply, yet the information obtained will not improve water quality nor will it provide the
28 Central Coast Water Board with useful information.

1 Besides economic harm, growers will also face immediate liability with respect to
2 complying with certain provisions of the Conditional Waiver and MRP Orders. In particular,
3 Provisions 22 and 23 of the Conditional Waiver (section B above, ¶¶ 1 and 2) collectively create
4 an obligation for agricultural dischargers subject to the Conditional Waiver to immediately
5 comply with water quality standards. (Conditional Waiver, p. 18 [“Dischargers must comply
6 with applicable water quality standards, as defined in Attachment A, protect the beneficial uses of
7 waters of the State and prevent nuisance as defined in Water Code section 13050.”]; *ibid.*
8 [“Dischargers must comply with applicable provisions of the Central Coast Region Water Quality
9 Control Plan (Basin Plan) and all other applicable water quality control plans as identified in
10 Attachment A.”].) Such immediate compliance with all water quality standards is not feasible,
11 and to require such compliance subjects growers to immediate harm. In its adoption of the
12 Conditional Waiver, the Central Coast Water Board recognized that immediate compliance with
13 water quality standards was not achievable. (See Conditional Waiver, Attachment A, Additional
14 Findings, Applicable Water Quality Control Plans and Definitions for Conditional Waiver of
15 Waste Discharge Requirements for Dischargers from Irrigated Lands (Attachment A), p. 41
16 [“This Order includes specific dates to achieve compliance with this Order and milestones that
17 will reduce pollutant loading or impacts to surface water and groundwater in the short term (e.g.,
18 a few years) and achieve water quality standards in surface water and groundwater in the longer
19 term (e.g., decades);”].) However, and notwithstanding this finding, the provisions of the
20 Conditional Waiver require immediate compliance and are not subject to any compliance
21 schedule-type of provisions within the enforceable provisions of the Conditional Waiver. As in
22 all cases, the “hereby ordered” provisions create the rights and obligations of those subject to the
23 order. Accordingly, under the Conditional Waiver, dischargers must comply with water quality
24 standards – immediately.

25 When questioned about this issue, legal counsel advised the Central Coast Water Board
26 that for nonpoint source pollution “compliance with Water Quality Standards means to implement
27 management practices. If they aren’t effective in reducing discharges to meet Water Quality
28 Standards, that they revise or do new management practices.” (March 15, 2012 Transcript,

1 p. 54:1-5.) However, in the absence of any textual support stating this in the provisions
2 themselves, this intent is meaningless. (See *Natural Resources Defense Council v. County of Los*
3 *Angeles* (9th Cir., July 13, 2011, No. 10-56017) 2011 U.S. App. Lexis 14443.)

4 Furthermore, the groundwater monitoring and individual surface water discharge
5 monitoring requirements in the MRP Orders were adopted for the purpose of determining
6 compliance with the Order. Under these provisions, monitoring data must be collected and
7 reported by October 1, 2013 and March 15, 2014, respectively. (Tier 1 MRP, p. 10; Tier 2 MRP,
8 p. 10; Tier 3 MRP, pp. 10, 16.) This data may be used by the Central Coast Water Board staff
9 and others to allege a grower has violated the requirement with respect to needing to comply with
10 water quality standards, which could result in administrative or civil liability. (Conditional
11 Waiver, p. 6 [“The Central Coast Water board will evaluate various types of information to
12 determine compliance with this Order such as, . . . c) individual discharge monitoring results,
13 d) receiving water monitoring results, and e) related reporting.”]. Thus, the harm to growers
14 while the State Water Board conducts its review is more than just economic and may subject
15 growers to unwarranted liability.

16 With respect to the benefit to be gained, there is none.

17 Accordingly, the costs to agricultural producers are excessive in relation to the benefit to
18 be gained. Furthermore, being subject to immediate liability while the State Water Board reviews
19 the Petition would result in substantial harm to Petitioners’ members.

20 **2. If the State Water Board Grants the Stay, Neither Interested Persons Nor the**
21 **Public Interest Will Suffer Substantial Harm**

22 A stay of the provisions identified in section B will not cause substantial harm to
23 interested persons or to the public. Specifically, most of the provisions for which a stay is
24 requested are monitoring and reporting provisions. (Section B, above, ¶¶ 4-22.) A stay of these
25 provisions will in no way harm the public, as they are costly to growers but do not in of
26 themselves result in water quality improvements. (See *In the Matter of IBM*, p. 7 [State Water
27 Board found that delay of technical report resulted in no immediate impact to water quality].)
28 Their purpose is to provide information to the Central Coast Water Board – they will not improve

1 water quality. (Wat. Code, § 13267(b)(1).) Further, their benefit and value with respect to
2 providing the Central Coast Water Board staff with useful water quality information is also
3 suspect in any event. As indicated previously, the individual surface discharge monitoring
4 program will not adequately assess water quality on the farm, and the nitrate loading
5 methodologies are too simplistic and will not provide accurate field level information. (See
6 section D.1, above.)

7 The provisions for which a stay is requested that require immediate compliance with
8 either water quality standards or specific management practices (section B, above, §§ 1, 2, 3,
9 and 11) also will not cause substantial harm to the public while the State Water Board conducts
10 its review. With respect to the provisions identified in section B, paragraphs 1 and 2 of this Stay
11 Request, the Central Coast Water Board recognizes that compliance with water quality standards
12 may take decades. (Conditional Waiver, Attachment A, p. 41.) Thus, a stay of these provisions
13 in the short-term will not substantially harm the public.

14 With respect to provisions identified in section B, paragraphs 3, 4, and 12 of this Stay
15 Request, these requirements dictate management practices. Specifically, provisions identified in
16 paragraph 3 require all dischargers to install and/or maintain backflow prevention devices for any
17 irrigation system that is used to apply fertilizers, pesticides, fumigants, or other chemicals
18 (Conditional Waiver, pp. 19-20); provisions identified in paragraph 4 require all dischargers to
19 immediately maintain all existing, naturally occurring, riparian vegetable cover, and riparian areas
20 for other multiple purposes (Conditional Waiver, p. 20); and, provisions identified in
21 paragraph 12 require maintaining filter strips of appropriate widths that consist of undisturbed soil
22 and riparian vegetation (Conditional Waiver, p. 31). A stay of these specific management
23 practices will not substantially harm the public. Moreover, the Conditional Waiver includes
24 another provision (which is *not* part of this Stay Request) to “implement management practices,
25 as necessary, to improve and protect water quality and to achieve compliance with applicable
26 water quality standards.” (Conditional Waiver, p. 15.) Through this provision, agricultural
27 dischargers must implement appropriate management practices. In contrast, provisions identified
28 in paragraphs 3, 4, and 12 of section B dictate the specific practices and provide no flexibility for

1 agricultural dischargers to self-select appropriate management practices. Staying the specific
2 management practices as requested does not remove any requirements with respect to
3 implementing management practices that must improve and protect water quality. Thus, the
4 public would not be harmed.

5 **3. The Disputed Actions Raise Substantial Questions of Fact or Law**

6 There clearly exist substantial questions of fact or law with respect to the provisions
7 identified in this Stay Request, as well as many others. In general, the challenged provisions, and
8 the Central Coast Water Board's adoption thereof, fail to meet the legal standards set forth in
9 statute; are not properly supported by findings; and, most importantly, were adopted illegally due
10 to improper ex parte communications and other due process violations.

11 As a preliminary matter, the Central Coast Water Board's adoption of the Conditional
12 Waiver and MRP Orders, in their entirety, is suspect. As fully documented in the Petition,
13 substantial evidence exists to show that amendments presented by Board Member Johnston
14 (hereafter referred to as the Johnston Proposal) after the close of the public comment hearing
15 where the result of improper, indirect ex parte communications between Board Member Johnston
16 and Mr. Steve Shimek (an interested party) through the actions of Executive Officer Briggs. In
17 short, Mr. Shimek presented proposed amendments (hereafter referred to as the Shimek Proposal)
18 to Central Coast Water Board staff and others, including Executive Officer Briggs. Concurrently,
19 it appears that Board Member Johnston approached Executive Officer Briggs with some ideas,
20 and wanted Central Coast Water Board staff's assistance in further developing his proposal.
21 After what appeared to be some back and forth between Board Member Johnston and Executive
22 Officer Briggs, the final Johnston Proposal was conveyed from Executive Officer Briggs to Board
23 Member Johnston and Chair Young the day before the hearing. The Johnston Proposal was then
24 presented to the rest of the Central Coast Water Board after the close of public comment, and at
25 the beginning of Board deliberations. The Johnston Proposal included a new Condition 11, which
26 essentially mirrored the Shimek Proposal. By taking the Shimek Proposal and inputting it into
27 Mr. Johnston's proposal, Executive Officer Briggs indirectly created an improper ex parte
28 communication between Shimek and Johnston. Such an action clearly violates the fundamental

1 principles of due process, and the statutory requirements with respect to ex parte communications.
2 Consequently, the Central Coast Water Board's action was invalid.

3 Notwithstanding the illegality of the Central Coast Water Board's actions with respect to
4 process, there are other significant questions of fact or law associated with the adopted
5 provisions. For example, the monitoring and reporting requirements (section B, above, ¶¶ 5-22)
6 were presumably adopted under the Central Coast Water Board's section 13267 authority.
7 (Conditional Waiver, p. 13; Conditional Waiver, Attachment A, p. 41; Wat. Code, § 13267(b)(1)
8 [provides the Water Board with authority to require technical or monitoring reports].) When
9 using its section 13267 authority, the Central Coast Water Board is required to show that the
10 burden for the report, including costs, bears a reasonable relationship to the need for the report.
11 (Wat. Code, § 13267(b)(1).) Further, when requiring such reports, the Central Coast Water Board
12 must provide the request in writing explaining the need, and *shall identify* the evidence that
13 supports the request. (Wat. Code, § 13267(b)(1).) Based on the plain reading of section 13267,
14 the Central Coast Water Board must follow this for each technical or monitoring report required.
15 This has not occurred. Instead, the Central Coast Water Board adopted a generic finding that
16 applied generally to all of the technical and monitoring requirements. (Conditional Waiver,
17 Attachment A, p. 43.) The Central Coast Water Board's failure to specifically identify the
18 evidence with respect to each report creates a substantial question of fact and law.

19 Moreover, evidence in the administrative record indicates the burden of preparing these
20 reports is not reasonable as compared to the benefit to be gained. For example, as discussed
21 above, an experienced professor in water quality issues testified that the individual surface water
22 monitoring provisions will not actually describe water quality on the farm, will not determine
23 practice effectiveness and will not provide any trend analysis (March 14, 2012 Transcript,
24 p. 214:14-18), which are presumably the Central Coast Water Board's reason for adopting such
25 requirements. (Conditional Waiver, Attachment A, p. 44 ["This Order also requires monitoring
26 and reporting as defined in MRP Order No. R3-2012-0011-01, MRP Order
27 No. R3-2012-0011-02, and MRP Order No. R3-2012-0011-03 to determine the effects of
28 discharges of waste from irrigated lands on water quality, verify the adequacy and effectiveness

1 of this Order's terms and conditions, and to evaluate individual Discharger's compliance with this
2 Order."].) Likewise, the nitrate loading risk determination and reporting requirements (section B,
3 above, ¶¶ 6, 7, 11, 15, 16, 19, and 20) will also fail to provide the Central Coast Water Board with
4 the information sought. (See Zelinski Decl., ¶¶ 7, 8, 9.)

5 With respect to the specific management practices identified in the stay (section B, above,
6 ¶¶ 3, 4), the adoption of such requirements violates the statutory prohibition against dictating
7 manner of compliance. Water Code section 13360(a) states that no order of a regional board shall
8 specify "the design, location, type of construction, or particular manner in which compliance may
9 be had." Requiring agricultural dischargers to maintain riparian areas, including naturally
10 occurring riparian vegetative cover constitutes dictating the manner of compliance. The
11 requirement for installing and maintaining backflow prevention devices also rises to the level of
12 dictating manner of compliance.

13 Thus, substantial questions of fact or law exist.

14 **E. CONCLUSION**

15 This Stay Request demonstrates that the actions disputed in the Petition raise substantial
16 questions of fact or law. This Stay Request also demonstrates that a stay of the challenged
17 provisions of the Conditional Waiver and MRP Orders will not cause substantial harm to
18 interested persons or the public. However, a stay is necessary to prevent Petitioners' members
19 from incurring substantial harm in the form of an expenditure of private resources and immediate
20 exposure to liability. Accordingly, Petitioners respectfully request that the State Water Board
21 stay the provisions identified.

22 SOMACH SIMMONS & DUNN
23 A Professional Corporation

24 DATED: April 16, 2012

By: 

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